EMPLOYMENT TRIBUNALS

Claimant: Mr H Kellermann
Respondent: Pets Abroad UK Ltd

Heard at: Watford **On:** 5 November 2024
Before: Employment Judge Dick

Representation
Claimant: Mr R Kellerman (the claimant's father)
Respondent: Miss S Mckenzie (litigation consultant)

RESERVED JUDGMENT

The claimant was not an employee of the respondent before 1 February 2022. The claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

REASONS

INTRODUCTION, ISSUES, PROCEDURE

1. By way of a claim form presented on 21 October 2023 the claimant says he was unfairly dismissed by the respondent on 10 June 2023. The claimant originally started work for the respondent on 21 January 2020; a significant issue in dispute between the parties (which I refer to below as the employment status point) is whether the claimant was an employee within the meaning of the Employment Rights Act 1996 ("ERA") from that date, as the claimant says, or instead only from 1 February 2022, as the respondent argues, the latter date being the date on which both parties agree the claimant signed a document headed "contract of employment" with the respondent. The issue is significant because if the respondent is right the claimant did not have the minimum two years' service without which there is no jurisdiction for the Tribunal to consider a claim for "ordinary" unfair dismissal, and that is the only complaint before the Tribunal. (Although there are exceptions to that two-year time limit, none of them apply in this case.)

2. The case had originally been listed for a two-day final hearing in September 2024, at which both the employment status point and the substantive claim for unfair dismissal were to have been decided. On 4 October 2024 the date for that hearing was changed to 12 December 2024. On 11 October 2024 my colleague Employment Judge ("EJ") Shastri-Hurst ordered that there would be a preliminary hearing on 5 November 2024, i.e. the hearing to which this judgment and reasons relate. EJ Shastri-Hurst's orders said that at the hearing a judge would "decide on the respondent's application to strike out, which will necessitate determining the issue of the claimant's employment status and whether he therefore had qualifying service for bringing an unfair dismissal claim". (The application to strike out, on the basis of lack of the two years' service, was contained within the response to the claim.) EJ Shastri-Hurst also made the following orders

> Given that the last listed hearing was postponed shortly beforehand, it is assumed that the final hearing bundle and witness statements have all been finalised and prepared, and deal with the issue of employment status.
> On that basis, the respondent is to send to the tribunal an electronic copy of the bundle and statements on or before 5 December 2024 [*clearly this should have read 5 November*].
> The respondent is ordered to provide written submissions setting out the law on employment status to both the claimant and the tribunal on or before 5 December 2024 [*ditto*]. This should assist the claimant in understanding the legal framework relevant to this question.
> The claimant will give evidence and be cross-examined at this hearing. If the respondent wishes to call any of its existing witnesses regarding the issue of employment status, it must confirm to the tribunal and the claimant the identity of any witnesses attending the preliminary hearing on or before 29 October 2024.
> This will give the claimant the opportunity to prepare any cross-examination of any witnesses. Cross-examination means the claimant can challenge the evidence of a witness by asking them questions.

3. On 29 October the respondent emailed the Tribunal to say that it would not be calling any witnesses at the preliminary hearing, and also to provide the statements and submissions in accordance with the above orders.

4. As EJ Shastri-Hurst had anticipated, a bundle and statements had already been prepared for the final hearing. (Despite the respondent's efforts there was some delay in getting the bundle to me which caused something of a delay, although fortunately there was still sufficient time for me to hear the evidence and submissions.)

5. At the start of the hearing I asked the parties for their submissions on whether I should deal with the employment status point as a substantive issue (which would require me to make findings of fact having heard evidence and then make a final determination about whether the Tribunal had jurisdiction to hear the claim) or instead simply to hear the respondent's application for strike out

(which would not necessarily require evidence and findings of fact and which, were the application refused, would leave the employment status point still to be decided at the final hearing). I explained the differences, particularly for the benefit of Mr Kellerman Sr, who is not legally qualified (though he did, I should say, ably represent his son and I express the Tribunal's thanks for his assistance). I explained that if I was to make findings on the evidence, I would be prepared to take account of the written statements provided by the respondent, but that those would inevitably carry less weight on matters of disputed fact since the witnesses would not have given evidence under oath and been cross-examined. The claimant's view, Mr Kellerman Sr having been offered time to consider the matter, was that it was best to proceed today on what evidence was available. Miss Mckenzie for the respondent had explained that the respondent had not asked their witnesses to attend because they had understood EJ Shastri-Hurst to have ordered that the issue would be dealt with by way of strike out application rather than decided substantively. It was the respondent's preferred position that the matter be dealt with by way of strike out application, although Miss Mckenzie fairly conceded on the respondent's behalf that to deal with the matter substantively would not cause the respondent any material prejudice since there was contemporaneous evidence within the bundle (WhatsApp messages etc.) which the respondent could rely on in relation to the factual issues that were in dispute.

6. It seemed to me that, despite her saying the strike out application would be decided, taking her orders as a whole, including the reference to evidence and cross-examination, and considering also her use of the words "determining the issue [of employment status]", EJ Shastri-Hurst must have intended that the issue of employment status be determined substantively at the preliminary hearing. I therefore considered that I was bound to determine that point, there having been no material change of circumstances or some other substantial reason (*Serco* v *Wells* UKEAT/330/15). Even if I had not considered myself bound, I would still have decided to deal with the issue substantively, given in particular the position of the parties which I set out in the previous paragraph and given also my preliminary view that dealing simply with the strike out application might well result in the issue of employment status being left to the final hearing, with little having been achieved at the preliminary hearing.

7. In the event, the respondent was able to call their witness Mrs Cirone to give evidence. I was conscious that Mr Kellerman Sr had not been expecting to have to cross-examine a witness, but I was able to allow him sufficient time to prepare to do that, particularly given the delays in getting the bundle to me (I was the only one who did not have a copy). Giving Mr Kellerman the opportunity to cross-examine seemed the fairest approach in all the circumstances, the alternatives being a postponement of the hearing or relying simply on the written evidence. Neither party sought to dissuade me from this course of action. I did make clear that if it should become apparent that Mr Kellerman Sr had not asked about a particular significant point, in the circumstances I would not hold that against him (or, more importantly, the claimant).

8. After taking time to read the statements and those pages of the bundle which the parties agreed were relevant to the employment status issue, I heard

evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. As I have said, the respondent called Mrs Cirone, its director. The claimant gave evidence on is own behalf, having adopted as his evidence his particulars of claim and some written submissions as well as his statement. I then heard oral submissions from the parties, also taking into account their previously-prepared written submissions.

9. I reserved judgment. The parties accepted and agreed that (i) if I found the claimant was an employee, the claim was ready for trial (ii) if I found the claimant was not an employee before February 2022, the claim must be dismissed.

FACT FINDINGS

10. I find the following facts on the balance of probabilities. Where facts were not in dispute I simply record them; where I have needed to resolve disputed facts I make that clear. I have not made findings on every factual dispute presented to me, but merely on those which assisted me to come to a decision bearing in mind the point in issue.

11. Although the respondent provided statements from a number of witnesses who did not give oral evidence, I did not find it necessary to rely on any of those statements, save for recording some of the uncontentious facts below relating to the nature of the respondent's business which were contained in the statement of Mr Andre Cirone.

The respondent's business; start of the claimant's engagement

12. The respondent company is a "pet travel specialist" – as its name implies, its work involved transporting animals abroad. It employs 16 people working from one site. The claimant started work for the respondent on 21 January 2020 as a pet travel driver. His role was to transport pets between airports and their homes – some trips were short, others involved long haul trips in the UK and on the continent. As well as driving, the claimant was responsible, amongst other things, for ensuring the comfort and safety of pets during transit, completing paperwork and documentation related to the travel, coordinating with airline staff to facilitate smooth transfers and keeping the vehicle clean. Until 1 February 2022 there was no written contract or other written agreement between the parties. The claimant accepted in his oral evidence that he was "classified as a contractor", which is how the respondent described him. The claimant had been introduced to the respondent by his mother, who was already working for the respondent in the same role.

The nature of the claimant's work till February 2022

13. When the claimant worked he wore a uniform and drove a liveried pet transport vehicle, which he kept possession of over the course of his engagement. He paid for fuel using a credit card supplied by the respondent. There was no

suggestion that the claimant had to provide any of his own materials or equipment. It was not disputed that the claimant had access to the respondent's internal systems, which appears to have been necessary for him to do his role. Nor was it disputed that the claimant attended team meetings, nor that that he would have been subject to the respondent's disciplinary processes, though that situation did not arise before February 2022. He and the respondent considered him to be a "keyworker" over the period of the COVID-19 pandemic. Indeed it appears that he was the only driver working for the respondent, at least over some of that period. He was issued with photo ID for the respondent in January 2021.

14. The claimant did not receive paid holidays or sick pay. He was paid, having raised an invoice, for the hours he had worked. He was responsible for paying his own tax and national insurance.

15. The respondent operated a weekly rota system, operating over weekdays and also over weekends; work over weekends was considered overtime. Once in place, the "rota'd" jobs determined where and when the claimant worked, but there was a dispute about the extent to which the claimant was bound to accept rota'd work. The claimant's position was that he was only allowed to refuse work at weekends, i.e. overtime; otherwise he was bound to accept work on weekdays. The respondent's position was that the claimant could always choose which jobs to accept. Mrs Cirone's evidence was that the claimant and his mother would work together to decide which jobs they wanted to take between them, delegating the available work amongst themselves, and that the claimant was free to accept or to refuse work as it suited him (as was his mother). For the reasons which follow, and in particular the evidence contained in the WhatsApp messages (see below), I prefer Mrs Cirone's evidence on this point.

16. Once he had accepted work, the claimant was obliged to do the work himself, subject to two points. First, the proposition does not appear ever to have been tested in practice. Second, and more significantly, a particular exception to that was that the respondent essentially treated the claimant and his mother as one interchangeable "unit" – so long as the work was done by one or the other of them, the respondent clearly did not mind which. On one copy of the rota which I was shown (which Mrs Cirone agreed was typical), the claimant and his mother take one slot rather than two, as "Isi/Harry". It is also right to say that on the rota I was shown there is a separate slot for "Contractor" and, as Mrs Cirone agreed, the other named persons were employees. Given the way the respondent assigned work, and given also that (as I detail below) the claimant and his mother usually were available for work and worked frequently for the respondent, I do not however consider this to show that the respondent did not regard the claimant and his mother as contractors.

17. The claimant provided a table which showed the monthly hours he worked in 2021. These varied between around 135 and 240, with the exception of April (63 hours) and December (80 hours). The respondent's suggestion, put in cross-examination, that this showed that the claimant was not entitled to set hours must be viewed in context – as the claimant pointed out this was during

the pandemic and the claimant was working in a role dependent on air travel, so the amount of work was bound to vary somewhat. However, the figure for December in particular is significant – see below.

Other work

18. The parties agreed that from time to time the claimant did do some other work, although the extent of that was in dispute. The other work the claimant did fell into two categories.

19. First, the claimant sometimes worked as an extra in the film industry. I accept the claimant's evidence that this was occasional and was more in the way of a hobby than an occupation. Although there are some examples within the WhatsApp texts of the claimant informing the respondent in advance of his extras work, and the respondent organising the claimant's driving work around his extras work, I regard this as a neutral point as regards employment status – I consider that the claimant would have been able to do his extras work, as a hobby, being accommodated by the respondent, whether or not the respondent considered him an employee or a contractor.

20. Second, the claimant also did some work for a company called Go Fetch and its subsidiary, which did similar work to the respondent and which the respondent therefore describes as a competitor. The claimant said that Go Fetch was based on the same premises as the respondent and they would "mutually help" each other with jobs. He accepted that he had done four separate "jobs" [i.e. one-off pieces of work] for them between July and October 2020, but said it had always been with the permission of Mr or Mrs Cirone. On the basis of Mrs Cirone's evidence I find that it was more the case that the respondent simply had no objection to this happening as it regarded the claimant to be a contractor.

Messages

21. In the bundle (from page 130) was an agreed print out of messages exchanged in a WhatsApp group between Mrs Cirone, the claimant and his mother from September 2020 to September 2022. The name of the group was "Team Kellerman". There are a considerable number of messages where work is discussed. I do not purport to summarise all of them, but I found the following exchanges to be of particular significance.

22. On 17 September 2020 Mrs Cirone told the Kellermans to invoice for a minimum of six (instead of the previous four) hours for out-of-hours work, and also increased their hourly rate. She added: "also, if either of you would like a full-time role… Just say the word". Mrs Kellerman thanked her and said: "Practically working full-time anyway… Maybe have a chat at some point". It seems to me that this exchange provides some evidence to show that the parties were operating on the basis that there was no employment contract. While of course it is possible to be a part-time employee, I find that in the context Mrs Cirone was using "full-time" as a synonym for "employed".

23. On 1 October 2020 (a Thursday) Mrs Cirone asked if the Kellermans had seen the updated rota she had sent earlier. Mrs Kellerman replied: “Yes ... fine for me tomoz. Praying Harry good for weekend... otherwise I'll do Sunday morning.” “Tomoz” must have been a reference to Friday and so in my judgment the message appears to show that Mrs Kellerman was agreeing to work on a Friday and also offering to work at the weekend if the claimant was not available.

24. On 2 January 2021 Mrs Cirone wrote: “Hey team Kellermann! Happy new year all round. Just checking in to see if you’re both keen to be back to work on Monday? We have a busy week ahead.” The claimant’s reply was: “Happy New Year, yeah I’m definitely back for the busy week.” This exchange appears to me to indicate a clear understanding between the parties that the claimant was free to accept or to turn down work for the whole of the following week. I draw a similar conclusion from the following exchange. On 10 January 2021 (a Sunday) Mr Cirone wrote: “Hi Kellermann's! I just sent an updated rota.....can you let me know if you're OK to cover tomorrow's jobs?”. The claimant’s reply was: “All good, I’m doing Wales and Isi [the claimant’s mother] is the Southampton.” I note that this is a response to a changed rota – so that even in circumstances where an employee was bound to work on the rota, one might expect the employer to check that they had no difficulty with the change, but I also note that this is an example of the parties’ intention/practice that the claimant and his mother would distribute available work amongst themselves. A similar example of this comes on 15 September 2021 where Mrs Cirone writes: “Hey both, I just sent next weeks rota. Please let me know who's doing what when you get a chance...” Other examples: on 16 May 2021 is an exchange between the claimant and his mother deciding who would do which shift, and on 10 July 2021 (a Sunday) Mrs Cirone wrote: “Hey guys, the rota is up as far as Tuesday ! eeessshhh! Can ya please have a look and allocate? .....also, any takers for tomorrow's check in?” This is therefore an example not just of the claimant and his mother being expected to allocate work between themselves, but also of the respondent requesting – not requiring – them to work the following day, a weekday.

25. On 3 February 2021 Mrs Cirone wrote a long message which began: “I will put a proper rota together, but this is a rough idea of next week...” She then set out potential work all over the country in the coming weekdays, concluding: “Just thought I'd put this out there as we will likely struggle without you Harry.....unless Isi wants to traverse the country like a maniac..... Let me know your thoughts guys”. She then said that a delivery the following day had been cancelled but there was other work and asked if the claimant was still happy to do that. The claimant’s response was: “No problemo.” In my judgment it is clear here that Mrs Cirone is operating on the basis that the claimant was entitled to turn the work down. There are other examples in the texts of Mrs Cirone asking whether the claimant would be prepared to work on certain days, and while some of these are weekends, not all of them are.

26. On 1 May 2021 Mrs Cirone wrote: “Hey both, I have prepared the rota for next week! Can you please let me know ASAP what you can do - specifically Monday and Tuesday, so I at least know the first part of the week is sorted.”

27. On 18 June 2021 Mrs Cirone wrote: “Mon & Tues are 1 driver days- … perhaps you could come to the office one of those days and do some stuff??” On the one hand this supports the claimant’s contention that he did sometimes do office or administrative work. On the other hand, it is clearly phrased as a request, based on the assumption that the recipient was not obliged to work on that particular day.

28. The claimant made the point that any reasonable employer might be flexible when it comes to compiling a rota. I accept that even where an employee is required to work on a rota, a reasonable employer may take account of the employee’s preferences and availability without it changing the fundamental fact that the employee is obliged to work. But although the texts show the claimant and his mother allocating work between themselves, I do not accept that the texts show they were allocating work which they were *obliged* to do. One message on 12 June 2021 does show the claimant asking for a Tuesday off, but so far as that suggests that the claimant considered he was obliged to work that day unless he had permission not to, that is inconsistent with the more general practice shown in the other messages; I consider it more likely that this was the claimant simply informing the respondent that he was not available on the Tuesday; I note that there was no response along the lines that his request for time off had been granted, which one might have expected if that was how the parties viewed the situation. Ultimately I accept Mrs Cirone’s evidence, which was that she had no power to require the claimant to accept shifts; she would offer them based on the respondent’s capacity and would offer what she thought were appropriate options and, although the majority of the time the claimant took the shifts, there never was an obligation for him to do so. When the claimant was unavailable for work Mrs Cirone accepted that without complaint, as he was not a full-time employee. That evidence was consistent with the parties’ practice as revealed in the WhatsApp messages.

The contract of employment

29. Mrs Cirone’s evidence, which I accept, was that in January 2022 the claimant approached the respondent saying that he wanted to become an employee, mentioning that that was because he was looking for a mortgage. The respondent agreed to his suggestion. Clearly the respondent had been happy with the claimant’s work up until this point otherwise it would not have offered him the contract. As well as the WhatsApp group which I have referred to above, I was also shown a message sent individually by the claimant to the respondent (i.e. Mrs Cirone) on 7 January 2022. So far as is relevant it reads:

> I’m wondering about the possibility of coming on to the books in future. I know I have been on a temporary situation since I started but seeing as I’m now working with you guys for some time now it would make more sense for this route. One of the reasons is also how December panned out for me, I can’t sustain myself on less [than] £1000 a month as a full-time driver. Please let me know your thoughts and what the process would entail going forwards.

30. The reply, again so far as is relevant, was:

> We are totally keen to take you on full-time. Makes sense I think and it is working really well with [another employee]. Let's chat next week and make a plan?

31. What the claimant says during this exchange casts some light on the fact that he did a smaller number of hours than was usual in December 2021. It seems to me that this reflects a common understanding between the parties that the respondent had not been obliged to, and did not, offer the claimant the number of hours that he might have preferred in December. His reason for wanting to come "on to the books" was clearly that, in coming on to the books, there would be a change in that the respondent would be obliged to offer him a set amount of work. I also note the claimant's own description of his work before then being "temporary". I consider that that is the claimant essentially saying, in a non-technical way, that he believed himself to be a contractor rather than an employee.

32. I was provided a copy of the employment contract which was signed by the claimant on 31 January 2022. It was accompanied by a formal offer letter dated 14 January 2022 from Mrs Cirone. There was no dispute about the terms of the claimant's employment from this point onwards; everyone agreed that he had the status of an employee. The terms were as follows. The claimant would be paid a monthly salary with normal working hours of 40 hours per week Monday to Friday. Precisely which hours worked during that time would be decided by agreement with the claimant's manager and subject to the respondent's business needs. He was entitled to 28 days' paid holiday and sick pay and after three months' service would be entitled to be a member of the respondent's pension scheme. (None of these, of course, applied before February 2022.) He would be reimbursed for out-of-pocket expenses subject to the respondent's policies. He was not permitted to do any other work during normal working hours. Outside those hours he could not work for any similar business without the respondent's prior written consent. He would be subject to the respondent's grievance and disciplinary procedures. After a probationary period the respondent and the claimant would be subject to a notice period as specified in the contract.

33. The contract stated that the claimant's continuous employment with the respondent began on 1 February 2022. Although it was suggested to me that the claimant had questioned this during an exchange of emails between the claimant and Mrs Cirone, I find that that was not the case. At the claimant's request I admitted a printout of the exchange into evidence during the course of the hearing. It took place on 27 and 28 March 2022. In it the claimant raised a number of queries about the terms of the contract which he was by now working to. The queries were mostly about how overtime would be paid and calculated; nobody suggested this was relevant to my decision. The claimant also wrote: "Additionally I enquired about the additional holiday time of 20 days based on having worked for Pets Abroad for two years prior to joining on contract and whether that was a possibility?" Mrs Cirone's reply was: "We can

review this next year after one year's full time service for sure, as it may be something we roll out across the board". Although the claimant refers to having worked for the respondent for two years, this is not in the context of questioning the term of his contract relating to continuity of service and, more significantly, the mention of two years is qualified by the claimant saying that was prior to him joining on contract.

34. It was the respondent's case that the claimant had been offered the chance to become an employee some time before February 2022 but that he had wanted to remain self-employed. I accept this, given the contents of the WhatsApp message of 17 September 2020 which I refer to above.

After 1 February 2022

35. As Mrs Cirone accepted in her oral evidence, the type of work which the claimant did after singing the contract did not change.

36. It was not suggested to me that any evidence about the (disputed) events which led to the claimant's dismissal was relevant to my decision and I make no findings about those events.

LAW

Employment Status

37. The starting point is s 230 ERA, which so far as is relevant provides:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

38. "Employee" is to be distinguished from "worker"; the latter is defined by s 230(3) ERA and is not relevant to this case in that workers do not have the right not to be unfairly dismissed, though it is relevant in the sense that some of the authorities I refer to below deal with the distinction between employees and workers.

39. In *Ready Mixed Concrete Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.
    i. The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer ("mutuality of obligation" and a requirement of "personal service").
    ii. The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's

control in a sufficient degree consistent with an employment relationship ("control").

iii. The other provisions of the contract are consistent with its being a contract of service.

40. Regarding mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that (described as the "wage-work bargain" in *Commissioners for His Majesty's Revenue Customs* v *Professional Game Officials Ltd* [2024] UKSC 29 ["the referees case"]). As long as there is an obligation to do *some* work, the fact that an employee is entitled to turn down (some other) work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service (*Ryanair DAC* v *Lutz* [2023] EAT 146 para 180). It appears to be the case that (with the exception of "single engagement" employment contracts, which are not relevant to this case) mutuality of obligation involves more than payment in return for personal work, but requires also an obligation on the part of the employer to provide work or pay in lieu of work (see the referees case).

41. Regarding control, in *Ready Mixed Concrete*, at 515, the court said:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted.

42. The question is whether there is to a sufficient degree a contractual right of control over the employee, rather than whether in practice the employee had day to day control over their own work. The *extent* of control will remain relevant to the overall assessment where the employee/worker establishes *sufficient* control to satisfy the *Ready Mixed Concrete* control requirement (*Revenue and Customs Commissioners* v *Atholl House Productions Ltd* [2022] I.C.R. 1059 at para 75).

43. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and on the basis of facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties (*Atholl House* (above)).

44. In *Uber BV and others* v *Aslam and others* [2021] UKSC 5 the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreements as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimants fell within the definition of a "worker". The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. As the same court put it in *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. The

Autoclenz/*Uber* principle applies to determination of employee status just as it does to the determination of worker status – *Ter-Berg* v *Simply Smile Manor House Ltd* [2023] EAT 2 para 47. In the latter case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather then stricter contractual principles. At para 65 onwards, the EAT said that a written term stating that a person is not an employee or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. Absent those circumstances, it is however legitimate to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

CONCLUSIONS

45. Dealing first with control, once the claimant had accepted work on the rota, there seems to me to be no dispute that he did that work under the respondent's direction and control. He wore their uniform, used their vehicle and equipment and was essentially representing the respondent when he interacted with customers (i.e. the pets' owners). There was no suggestion that he did not have to do the job in the way the respondent required. I consider that there was control in a sufficient degree consistent with an employment relationship. Beyond that threshold, however, the degree of control was low in that the claimant and his mother could decide amongst themselves which work to do.

46. Where the claimant's case fails in my judgment is on the issue of mutuality of obligation. For the reasons I have already given, the claimant was free to decide whether to accept work – he was under no obligation to do any, even if in practice he chose to work full-time or near full-time hours during 2021. Nor, as December 2021 demonstrates, was the respondent in fact obliged to offer him work, although again in practice it usually chose to. One of the fundamental aspects of an employment relationship was therefore absent in my judgment. Also, what requirement there was for personal service was qualified by the fact that either the claimant or his mother could do the work.

47. I turn now to the multifactorial approach. Given the respondent's size, the claimant was a significant part of the business. The fact that what the claimant did day-to-day did not change when he signed the contract is clearly a significant point in favour of their being a contract of employment before then; the same might be said of some of the other points I set out above. However, I set all that against the following. The parties themselves described the claimant as a contractor; while that might be of minor significance on its own, they also acted as if he was – most significantly in that he was not obliged to work, but also in the way that he was paid on invoice and was responsible for paying his own tax. It was the claimant himself who suggested "going on the books", with the clear intention of changing things. He might have been doing the same sort of work after going on the books, but he was doing so on different terms – with set hours (an obligation that extended to both parties) and with paid holiday and sick leave. It is also hard to see how the parties' treatment of the claimant

and his mother as one unit could be consistent with there being a contract of employment for one (or both) of them.

48. I did not consider the later written contract's specific words about continuity of employment to be significant in this case. The parties, and in particular the claimant, appear to have given the point little if any thought, but even if they had, that could not have changed the reality of the relationship before that point.

49. Looking at all of the evidence in the round, the parties did not intend to, and did not, create a contract of employment before February 2022. The claimant therefore only became an employee in February 2022 and so he does not have the two years' service required to bring a claim for unfair dismissal.

50. I do not need to go on to consider in this case whether the claimant would have met the ERA definition of "worker" before February 2022 as there is no complaint before the Tribunal which would depend on that.

Concluding remarks

51. Had this case proceeded to a final hearing, the respondent would have argued that the claimant was dismissed for a good reason, whereas the claimant would have wished to call evidence in support of his case, which was in essence that, although he may have made some honest mistakes, he had done nothing which warranted dismissal. I am sure that at least part of the claimant's reasons for bringing these proceedings was a desire to clear his name. I am conscious that my decision deprives him of that opportunity and acknowledge that he will be disappointed. This is unfortunately an inevitable result of the procedure adopted (quite properly) to deal with the issues in the case. I have explicitly made no findings about the reasons for the dismissal, nor should I be taken as offering a view – it would be inappropriate for me to do so, not having heard the relevant evidence.

52. Finally, in light of my decision I have ordered that the final hearing's listing is vacated. May I apologise now to the parties for keeping them waiting for this decision until so close to the listed date of that hearing – pressure of other work meant that I have only now been able to prepare the decision.

Employment Judge Dick

10 December 2024

SENT TO THE PARTIES ON
11 December 2024

FOR THE TRIBUNAL OFFICE